Public Version

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of Request for Review by United Data Technologies, Inc. of Decision of Universal Service Administrator	WC Docket No. 02-6 Funding Request Number 2209152 Form 471 Application Number: 813142

REQUEST FOR REVIEW BY UNITED DATA TECHNOLOGIES, INC. OF USAC DENIAL OF APPEAL

Danielle Frappier
Peter Karanjia
Alan Galloway
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006-3401

Attorneys for United Data Technologies, Inc.

June 29, 2017

SUMMARY

United Data Technologies, Inc. ("UDT") asks the Wireline Competition Bureau ("Bureau") of the Federal Communications Commission ("Commission") to review and reverse the decisions by the Universal Service Administrative Company ("USAC") that culminated in USAC's decision that it must claw back $872,586.54 – an entire year's worth of Schools and Libraries program ("E-rate") funding – because UDT provided a school district employee with three modest meals and a hotel stay that cost a total of $157.11, less than two months after the Commission's new gift rules at 47 C.F.R. § 54.503 went into effect. USAC's determination that the rules were violated is incorrect because UDT provided no "thing of value" to the District, as that phrase is used in Section 254 of the Communications Act of 1934 (the "Act"), in section 54.503, and in case law. USAC's determination to the contrary impermissibly interpreted the Commission's rules, which it is forbidden to do.

Even if there were a technical violation, USAC's determination amounts to a draconian penalty that is grossly disproportionate to the conduct at issue, and sustaining that determination would be inconstant with Due Process and the well-established "fair notice" requirement of the Administrative Procedures Act. First, UDT lacked fair notice at the time of the relevant events that the meals and hotel stay provided would be deemed prohibited "things of value." Case law has held that the phrase "thing of value" is limited to cash or cash-equivalents—which the hotel and meals disbursement were not. Second, and more fundamentally, the remedy imposed by USAC is contrary to Commission precedent – which was in effect at the time of the relevant events and remains good law – establishing that conduct like UDT's does not compromise the integrity of the bidding process. As a result, USAC's decision to rescind over $870,000 in funding, where UDT had no fair notice that such a draconian outcome would follow from even a

technical violation of the newly adopted gift rule also violates the principles of fair notice required by both administrative law and Due Process. Although the Commission is free to depart from its precedent, it may do so only prospectively and based on reasoning that would withstand APA review. What the Commission cannot lawfully do, however, is impose what is, in substance, a penalty based on a new understanding of the law that is inconsistent with precedent in effect at the time of UDT's conduct. Simply put, affirming USAC's draconian sanction based on a retroactive application of new legal principles would be both arbitrary and capricious and unconstitutional.

Moreover, here, where UDT's proposal was one of four considered, where the bidding process was kept open longer than required, and where UDT received both the best weighted score and the highest raw score, there is no basis for USAC's conclusion that the conduct here "resulted in "a competitive bidding process that was not open and fair." In any case, USAC was incorrect in concluding that the Commission's rules required forfeiture of the entire award, rather than a modest penalty that would be consistent with Due Process and fair notice, namely a fine based on applying a single-digit multiplier to the amount by which UDT purportedly exceeded the gift limit. Such a fine, here, would be less than $1000.

Finally, if the Bureau determines that a violation occurred, and concludes that application of section 54.503 would require a massive claw back like USAC proposes here, UDT asks that the Commission waive the application of section 54.503 here pursuant to 47 C.F.R. §§ 1.3 and 54.719, where the facts, precedent, and common sense show that there was, in fact, no threat to the competitive process, and the E-rate award has been used to purchase and install equipment for the District's benefit. Forcing UDT to bear the costs of this equipment while the District enjoys the benefits of that equipment would be inequitable, arbitrary and capricious.

TABLE OF CONTENTS

I. Interest in the Matter Presented for Review 1

II. Statement of Material Facts 2

III. Procedural History 4

IV. Questions Presented for Review 5

V. Relief Sought, and Provisions Under Which Relief Is Sought 6

VI. Argument 7

A. USAC erred in finding a violation of the FCC rules. 7

1. Section 54.503 bars gifts, gratuities, and favors only where the E-rate applicant receives a "thing of value." 8

2. The limiting phrase "thing of value" supports the conclusion that the gifts restrictions are aimed at pecuniary items (*i.e.*, cash or cash-equivalents). 8

3. UDT and the District did not violate section 54.503, here, because Mr. Hatcher received no cash, cash equivalents or other "things of value." 10

4. In determining that a violation occurred, USAC interpreted the FCC's rules, which it is forbidden to do. 11

5. Even If the Commission May Change or Clarify Its Rules Prospectively, UDT May Not Be Penalized for Conduct Based on a Reasonable Interpretation of the Commission's Rules. 11

B. Even if there was a violation, USAC failed to adhere to Commission precedent in concluding that there was not a fair and open process, which was its basis for clawing back the entire funding award. 13

1. Commission precedent shows that the type of conduct here (providing low-value meals and travel expenses) are not the type that undermine the fair and open nature of the bidding process. 15

a. *Kings Canyon* 15

b. *Dimmitt* 17

c. *Lakehills Consulting* 17

2. Commission precedent mandates a finding that UDT's conduct here did not compromise the competitive and open bidding process here. 18

3. Logic and common sense confirm that UDT's conduct did not threaten the integrity of the bidding process here. 20

C. Clawing back the entire E-rate funding award based on USAC's departure from Commission precedent would be arbitrary and capricious and would violate Due Process 21

D. While the Commission could abandon its precedent prospectively, doing so would have far-reaching, adverse policy implications 22

1. USAC's approach would undermine the goals of e-rate and discourage transparency 23

2. Reversing USAC would not mean that there will be no consequences for violations of the gift rules; the Commission has discretion to impose consequences for failure to abide by its rules. 24

E. Waiver is justified here to avoid disproportionate fines. 25

F. The District, not UDT, should pay the bulk of any amount owed as a result of violations here. 27

VII. CONCLUSION 27

I. INTEREST IN THE MATTER PRESENTED FOR REVIEW

Pursuant to 47 C.F.R. §§ 54.719 and 54.722, United Data Technologies, Inc. ("UDT") seeks reversal of USAC's decision which, if left in effect, would amount to "the administrative law equivalent of burning down the house to roast the pig."[1] UDT is a service provider that participates in the Federal Communications Commission's ("Commission" or "FCC") Schools and Libraries program ("E-rate"), and Miller County School District ("District") is a beneficiary school district. In 2011, a UDT employee and a District employee were both attending an out-of-town product demonstration. As a matter of courtesy and convenience, the UDT employee covered the modest costs of a hotel stay surrounding the product demonstration and meals for the District employee—a total amount of approximately $150.

Finding a violation of the Commission's new gift rules—which had entered into effect less than two months before the incident—USAC concluded that it must rescind an entire year of funding—$872,586.54 or, in other words, more than 5,000 times the cost of the hotel and meals. USAC erred in finding a violation of the newly enacted gift rules, and—more fundamentally—the draconian remedy it imposed is contrary to Commission precedent, sound policy, and common sense. It therefore should be reversed. If the Commission nonetheless declines to reach that outcome, at a minimum, UDT should be granted a waiver of the then-newly promulgated gift rule pursuant to 47 C.F.R. § 54.719(c). Absent such a waiver, [[[redacted]]]—without furthering any of the policies that undergird the rule allegedly violated in this case. Indeed, because the bulk of the funds were used by UDT to purchase and install the equipment for the District, forcing UDT to repay the full amount sought

[1] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 37 (3d Cir. 2016).

by USAC is grossly disproportionate to the alleged violation, and [[ ]].

II. STATEMENT OF MATERIAL FACTS

United Data Technologies, headquartered in Doral, Florida, is a technology enabler that has assisted schools and libraries with E-rate projects since 2000. UDT has a track record of outreach and assistance to underserved rural areas with small populations. Miller County is a tiny rural county in southwestern Georgia with a population of approximately 6,125. The Miller County School District serves about 1,200 students, and has one elementary school, one middle school, and one high school.

In the Sixth Report and Order, the Commission revised its E-rate competitive bidding rules set forth in 47 C.F.R. § 54.503.[2] The new rules took effect on January 3, 2011.

Less than two months later, on February 21, 2011, Jeff Hatcher, an employee of the District, traveled from Miller County to Atlanta on District business. Because Atlanta is the location of a Cisco Systems product demonstration center, a UDT employee, Billy Merchant, scheduled a Cisco product demonstration for Mr. Hatcher. Atlanta is about a three-hour drive from Miller County, which necessitated an overnight stay by Mr. Hatcher. To help coordinate their schedules, Mr. Merchant and Mr. Hatcher stayed in the same hotel and checked out at the same time. As a courtesy, Mr. Merchant paid for Mr. Hatcher's $106.12 hotel stay, and the two men attended the Cisco product demonstration together. After the demonstration, Mr. Hatcher and Mr. Merchant ate a modestly-priced business dinner together, and Mr. Merchant picked up the check for Mr. Hatcher's $29.79 meal as a matter of courtesy and convenience. On February

[2] *In Re Schools and Libraries Universal Service Support Mechanism*, Sixth Report and Order, 25 FCC Rcd 18762 (FCC 2010).

25, 2011, Mr. Merchant bought Mr. Hatcher lunch at a cost of $10.60. A few months later, on August 25, 2011—well after the contract for FY 2011 had been awarded—Mr. Merchant purchased a second $10.60 lunch for Mr. Hatcher. The expenditures totaled $146.51 during the bidding process, and just $10.60 during the 2011 funding year itself (*i.e.*, after the service provider for 2011 had been selected).

The District submitted an FCC Form 470 for an internal connections project on January 18, 2011, and encouraged multiple bids by keeping the bidding open until at least March 2011, longer than the 28 days required under the E-rate rules). Despite the rural District's small size and remote location, four service providers submitted bids in response to the District's Form 470. The District assessed all four providers, calculating both a raw score and a weighted score (with price receiving the most weight). UDT's bid had both the highest raw score (16 out of a possible 20) and the highest weighted score (3.85 out of a possible 5). The scoring reflected the multiple significant strengths of UDT's bid. UDT is a Cisco Gold Certified Partner, which means that its engineers undergo a rigorous training and certification program on Cisco equipment. Therefore, UDT could provide a much higher quality level of service and efficiency than other Cisco vendors. In fact, UDT received perfect scores (5 out of 5) on both experience and on compatibility with the District's network. UDT was the only Cisco Gold Certified Partner vendor that submitted a bid to the District, and its Cisco expertise was indeed a perfect fit for the District, which sought to leverage its earlier investment in Cisco technologies in a way that was most efficient and effective for both the District and the E-rate program. Because UDT's bid scored the highest among the four bids received – both in the raw score and weighted score – the District eventually entered into a contract with UDT.

Ultimately, USAC disbursed $872,586.54 in E-rate funds for the District's project with UDT. Those funds were utilized to purchase and install this equipment in the District. After UDT had procured and installed Cisco equipment using the E-rate funds and the District's "co-pay," UDT discovered the meal and lodging costs that Mr. Merchant had paid as a courtesy to Mr. Hatcher. In response to an inquiry from USAC, UDT reported these reimbursements to USAC on February 14, 2013. The School District also disclosed the meals and hotel stay to USAC when it responded to a USAC special compliance review during the first half of 2013.

On June 23, 2015, USAC sent a Notification of Commitment Adjustment Letter ("COMAD") to UDT for funding year 2011 (from July 1, 2011 to June 30, 2012). The COMAD contains three key findings. First, it contends that "there was not a fair and open competitive bidding process." Second, USAC concluded that the rules impose a strict liability standard, such that even technical violations of the gift rules must result in forfeiture of the entire E-rate funding award. Specifically, USAC stated that it "was *required* to rescind the commitment and seek recovery of the full amount disbursed as MCSD and UDT did not comply with the FCC gift rules."[3] Third, the COMAD indicates that USAC will seek recovery of the "improperly disbursed funds" from UDT, as well as the District.

III. PROCEDURAL HISTORY

Pursuant to 47 C.F.R. § 54.719(a), UDT filed a Letter of Appeal with USAC concerning the COMAD on August 20, 2015. On May 24, 2017, USAC denied the appeal. Although USAC's denial acknowledged that UDT has 60 days to appeal the decision under the Commission's rules per 47 C.F.R. § 54.720, on May 30, 2017, USAC notified UDT that USAC

[3] Administrator's Decision of Appeal, May 24, 2017 ("USAC Decision"), at 4 (emphasis added).

would seek recovery of the full $872,586.54 in 30 days—before the Commission could rule on the merits of UDT's appeal.

UDT notified USAC of its intent to appeal on June 6, 2017, and asked USAC to halt recovery efforts pending resolution of the appeal. On June 23, 2017, USAC refused to delay recovery in the absence of a filed appeal, which effectively allowed UDT just 35 days of the 60 days provided under 47 C.F.R. 54.720 to file an appeal with the Commission. This appeal is timely under 47 C.F.R. § 54.720(a)-(b) because it is being filed on June 29, 2017, within 60 days of the USAC denial. The Commission has authority to hear this appeal under 47 C.F.R. § 54.719(b)-(c) and § 54.722.

IV. QUESTIONS PRESENTED FOR REVIEW

1. Did USAC err in finding that UDT and the District violated the restrictions in 47 C.F.R. § 54.503 on "gifts… or any other *thing of value*" by providing a District employee with three modest meals and a one-night hotel stay – *none* of which were "things of value," a phrase that refers to cash or cash-equivalents?

2. Even if there was a technical violation of 47 C.F.R. § 54.503, did USAC improperly rescind the entire $872,586.54 awarded to UDT and the District, based on its assumption that any "gifts" in violation of section 54.503 necessarily compromised the competitive and open bidding process, despite FCC precedent to the contrary, and despite the fact that no competitors were disadvantaged here where UDT was the highest-scoring bid among four received, and was a perfect fit (5 out of 5 points) for the District's existing Cisco technology?

3. If the facts here require UDT to repay funds, should the amount demanded be proportionate to the amount by which section 54.503 was violated, *e.g.*, by applying a single-

digit multiplier to the amount by which UDT and the District exceeded the $50.00 gift limit in section 54.503, which here would result in payment of no more than $963.99?

4. Do the facts here – in which the competitive bidding process was not compromised by any gifts – constitute good cause for the Commission to waive section 54.503 here, rather than apply the draconian penalty proposed by USAC?

5. Did USAC improperly seek to claw back the $872,586.54 from UDT, rather than from the District, where UDT has delivered what it promised by using the E-rate funds to purchase and install equipment that benefits the District, and extracting the entire amount from UDT would leave the District to enjoy those benefits without cost, [[[redacted]]]?

V. RELIEF SOUGHT, AND PROVISIONS UNDER WHICH RELIEF IS SOUGHT

Pursuant to the Wireline Competition Bureau's ("WCB") authority under 47 C.F.R. §§ 54.719(b), 54.722(a) and 54.723(a), UDT respectfully asks that the Bureau grant the following relief:

1. UDT requests that the Bureau reverse USAC's finding that UDT and the District violated of 47 C.F.R. § 54.503 based on the modest meals and hotel stay that Mr. Merchant paid for as a courtesy to Mr. Hatcher.

2. If the Bureau determines that a technical violation occurred, UDT asks that the Bureau reverse USAC's finding in the COMAD that Mr. Merchant's covering of the meal and hotel expenses "resulted in a competitive bidding process that was not open and fair," which is contrary to Commission precedent and unsupported by the facts here, and also asks that the Bureau reverse USAC's resulting decision to claw back $872,586.54 – all the E-rate support that

UDT and the District received for funding year 2011, which is inconsistent with Due Process and fair notice.

3. If the Bureau ultimately orders repayment of E-rate funds based on the events that are the subject of this appeal, UDT asks that the amount demanded be proportional to the amount by which section 54.503 was violated. At worst, UDT exceeded that gift limit by $107.11. Multiplying that amount by nine (the largest single-digit multiplier) would result in payment of no more than $963.99.

4. If the Bureau ultimately seeks repayment of E-rate funds based on the events that are the subject of this appeal, UDT asks that the Commission recover those funds from the District, because UDT has already used the funds to purchase and install Cisco equipment for the District, and it would be inequitable, arbitrary and capricious to force UDT to bear the costs of this equipment while the District enjoys the benefits of that equipment.

5. In the alternative, UDT asks that the Commission waive the application of section 54.503 here pursuant to 47 C.F.R. §§ 1.3 and 54.719, because the facts, precedent, and common sense amply demonstrate that there was no threat to the competitive process.

VI. ARGUMENT

A. USAC erred in finding a violation of the FCC rules.

USAC erred in finding that a violation of Section 54.503 here. The modest meals and hotel stay at issue here was neither the type of "gift," or "gratuity" prohibited by section 54.503; nor were they "any other thing of value," which refers to cash or cash-equivalents. Moreover, USAC impermissibly interpreted Commission rules in applying section 54.503 to the benign conduct here.

1. Section 54.503 bars gifts, gratuities, and favors only where the E-rate applicant receives a "thing of value."

First, USAC's interpretation is in incorrect. Section 54.503 expressly limits the restricted conduct to providing a "gift, gratuity, favor, entertainment, loan, or *any other thing of value*." 47 C.F.R. § 54.503(d)(1) (emphasis added). The final clause, that is, the phrase "or any other thing of value," makes clear that each restricted item on the list must also be a "thing of value." *See Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."); *see also* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier at the end of the list "normally applies to the entire series."). Accordingly, section 54.503 only restricts the types of gifts, gratuities, favors, etc. that are themselves a "thing of value."

2. The limiting phrase "thing of value" supports the conclusion that the gifts restrictions are aimed at pecuniary items (*i.e.*, cash or cash-equivalents).

The phrase "thing of value" has a history in the E-rate program. As noted in the Sixth Report and Order, "Section 254(h)(3) of the [Communications] Act prohibits an eligible school or library that has purchased telecommunications services and network capacity at a discount under the E-rate program from reselling or otherwise transferring those services, or any

equipment components of such service, in consideration for money *or any other thing of value*."[4] As used in section 254, the phrase "thing of value" plainly refers to something comparable to money that could be used to pay for services (*i.e.*, cash-equivalents). The same phrase appears on FCC Form 471, in a similar context, as applicants are required to certify that they have not received "anything of value or a promise of anything of value other than the services and equipment requested on the form."[5] On Form 471, as in section 254, the phrase "thing of value" evinces pecuniary items (*e.g.*, cash, checks, gold, stock, bonds, etc.).

That is consistent with its interpretation in related contexts. Cases have interpreted the phase "thing of value" in the federal bribery statute to refer to various pecuniary items. *See*, *e.g.*, *U.S. v. Williams*, 705 F.2d 603 (2d. Cir. 1983); (stock); *U.S. v. Gorman*, 807 F.2d 1299 (6th Cir. 1986) (employment at a higher salary); *U.S. v. Menendez*, 132 F.Supp.3d 635 (D.N.J.2015) (campaign contributions). In the same vein, the Colorado Court of Appeals concluded that the phrase "any other thing of value," if not defined by statute, referred to "items such as cash and things that can be lawfully exchanged for cash, or financial payments," and excluded various "nonpecuniary benefits" obtained. *See People v. Beck*, 187 P.3d 1125, 1129 (Colo. App. 2008) (holding that nonpecuniary benefits obtained by identity theft were not "things of value").[6] The phrase itself, the similar phrasing in section 254(h)(3) and in Form 471, and the case law

---

[4] *Sixth Report and Order*, ¶ 73, citing 47 U.S.C. § 254(h)(3) ("Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.").

[5] *Sixth Report and Order*, ¶ 87.

[6] Although the Colorado Supreme Court ultimately settled on a broader interpretation for that phrase, it reached that conclusion only after determining that the Colorado legislature had, in fact, provided a statutory definition of "thing of value." *See People v. Molina*, 2017 CO 7, 388 P.3d 894 (holding the definition was intended to include additional statutory definition of "thing of value" that expanded the scope of the definition to include real property, personal property, services, among other items). Here, there is no dispute that no statute or rule specifically defines the phrase "thing of value," and *Beck* provides valuable guidance on interpreting the phrase absent a definition.

interpreting the phrase all suggest that the meaning of "thing of value" is limited to cash and cash-equivalents.

This is not to say that gifts pertaining to meals or hotels could *never*, in the right context, be "things of value" under section 54.503. A $3,500 hotel gift card, for instance, could be a "thing of value" if it could be easily exchanged for cash. But it does suggest that meals and hotel stays are not automatically deemed "things of value," and that the Commission's intent was that not all gifts pertaining to meals and hotels violate the FCC's competitive bidding rules.

3. UDT and the District did not violate section 54.503, here, because Mr. Hatcher received no cash, cash equivalents or other "things of value."

When the phrase "gifts … and any other thing of value" is properly construed—consistent with the authorities cited above to mean "gifts" that constitute cash and cash-equivalents, it becomes clear that neither UDT nor the District violated section 54.503. Although Mr. Hatcher was provided with modest meals and a one-night hotel stay as a courtesy, he never obtained anything that he could exchange for cash or sell, *cf.* § 254(h)(3); *Beck.* Having stayed in the hotel, he could not turn around and "resell" it; the same goes for the meals he consumed. Accordingly, the meals and hotel stay here were not properly considered "things of value" under section 54.503. Because those items were not "things of value," there was no violation of the rule. Indeed, unless the hotel stay is a "thing of value," there would be no violation here because the meals furnished over two funding years were within the $50.00 per person per year allowance authorized by the FCC rules.

The foregoing analysis is bolstered by the fact that the Commission knows how to write rules that clearly prohibit all meals and travel, but did not do so here. The Sixth Report and Order notes the Commission's longstanding prohibition on FCC employees accepting meals and travel. *See Sixth Report and Order*, n. 258 (citing 47 C.F.R. §§ 1.3001, 1.3002 and the E-rate

Broadband NPRM, 25 FCC Rcd at 6884-85, para. 29; also citing 47 C.F.R. §§ 1.3001, 1.3002). In enacting that prohibition, the Commission expressly defined "gift," and did so without using the phrase "any other thing of value" that it used in promulgating section 54.503. Had the Commission wanted the gift rules to flatly ban all meals and travel, it could have defined "gift" here in the same manner as in sections 1.3001-02. But it did not do so.

4. In determining that a violation occurred, USAC interpreted the FCC's rules, which it is forbidden to do.

Even if—contrary to the authorities cited above—the operative ("thing of value") language in the gift rule could be construed more broadly, USAC lacked authority to adopt its own, novel interpretation. USAC is not free to interpret the FCC's rules. Under 47 C.F.R. § 54.702(c), "[USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." Therefore, it is not free to choose the more expansive interpretation of section 54.503 over a narrower interpretation.

USAC's error is particularly egregious because it relies on its broad interpretation of section 54.503 to impose the massive fine of over $800,000. The penalty that USAC has proposed would create serious Due Process concerns, because UDT had no notice that furnishing meals and a hotel stay would be deemed "things of value" that subjected it to forfeitures of E-rate funding. As explained below, USAC's proposed action would separately implicate the well-established requirement, under the federal Administrative Procedure Act ("APA") that agencies provide fair notice of regulatory interpretations to the regulated public.

5. Even If the Commission May Change or Clarify Its Rules Prospectively, UDT May Not Be Penalized for Conduct Based on a Reasonable Interpretation of the Commission's Rules.

A "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television*

Stations, Inc., 132 S. Ct. 2307, 2317 (2012). Both Commission- and Bureau-level decisions are subject to the "fair notice" inquiry; the *Fox* court itself concluded that a broadcast station did not have fair notice that a seven-second nude scene was indecent when the FCC's Media Bureau had previously determined—in unpublished Bureau-level decisions—that a 30-second nude scene was "not actionably indecent." *Id*. at 2319. The court held in *Fox* that the Commission violated the "requirement of clarity in regulation" that is "essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id*. at 2317.

Separately, the Administrative Procedure Act ("APA") requires courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] in excess of statutory jurisdiction." 5 U.S.C. § 706(2)(A), (C). As part of its obligation to engage in reasoned decision-making, an "agency must always provide 'fair notice' of its regulatory interpretations to the regulated public." *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). An agency acts arbitrarily and capriciously when it unfairly "change[s] the rules in a way that could not be foreseen." *U.S. AirWaves, Inc.* v. FCC, 232 F.3d 227, 235 (D.C. Cir. 2000). The "fair notice" requirement is not limited to agency actions that are expressly described as penalties. Rather, it applies when an agency action that "entails the expenditure of significant amounts of money," and "deprives the [payor] of property no less than a fine," even if it is not an explicit penalty or described in overtly punitive terms. *See U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1354. (D.C. Cir. 1998).

The standard for determining whether an agency has provided fair notice is whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects the parties to conform." *General Electric*, 53 F.3d at 1329 (internal

quotation marks omitted). A regulated entity has not been given fair notice if it reasonably interpreted the rules—even if the agency adopts a different interpretation prospectively. *See, e.g., Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987). As *Satellite Broadcasting* explained, "[t]he Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" 824 F.2d 1, 3-4.

Here, it was reasonable to expect that the "thing of value" language in the newly-enacted gift rules would be interpreted in a manner consistent with the aforementioned case law. Thus, even if the Commission could clarify its gift rules to expansively define the key "thing of value" language, Due Process requirements and the APA's fair notice requirements prohibit the Commission (or USAC, as the Commission's agent) from imposing any forfeiture or penalties here where UDT lacked fair notice that the minor expenditures for non-pecuniary benefits here would be held to violate the Commission's just-then-enacted rules, or could be the basis for penalizing UDT by clawing back the entire $872,586.54 in 2011 E-rate support. Even if the $872,584.54 that UDT would be forced to remit to USAC is not expressly deemed a "penalty," it functions as a penalty, and certainly "entails the expenditure of significant amounts of money," and would "deprive[] [UDT] of property no less than a fine," thereby requiring fair notice. *Cf. U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1354. (D.C. Cir. 1998).

B. Even if there was a violation, USAC failed to adhere to Commission precedent in concluding that there was not a fair and open process, which was its basis for clawing back the entire funding award.

Even assuming a technical violation of the then-newly enacted gift rule in this case, USAC's even more glaring error was to wrongly assume that any violation of the rule—no matter how trivial—automatically requires rescission of the entirety of a funding award, no

matter how draconian the outcome. At a minimum, the Commission should reverse on this ground.

USAC's view is inconsistent with the Commission's recent expression of caution regarding seeking full reimbursement for "rule or program violation[s]" as opposed to "statutory" violations. The Commission's warning recognizes that automatically clawing back entire funding awards is not appropriate for all violations:

> We recognize the importance of preventing and ferreting out waste, fraud and abuse in the E-rate program and believe that strong rules requiring applicants to reimburse USAC if they are found to have violated a **statutory** obligation are a powerful deterrent to waste, fraud and abuse. At the same time, as our rules have expanded, the risk to applicants of having USAC or the Commission seek full reimbursement of previously disbursed funds based on a **rule or program violation** has also grown, and sometimes full reimbursement is not commensurate with the violation incurred.

In Re Modernizing the E-Rate Program for Sch. & Libraries, 28 FCC Rcd 11304, 11371 (FCC 2013) (emphasis added).

Moreover, USAC's decision to claw back all of the funding year 2011 support relies on its erroneous conclusion that "there was not a fair and open competitive bidding process" here. But that conclusion itself is inconsistent with Commission precedent, which establishes that the integrity of the bidding process is *not* threatened, or even impeded, by the payment of small expenses like those paid here. The conclusion that the types of expenses paid here do not alter the integrity of the competitive process remains good law today, even if paying those same types of expenses is a violation under the current rules, for which the Commission could impose appropriate sanctions.

1. Commission precedent shows that the type of conduct here (providing low-value meals and travel expenses) are not the type that undermine the fair and open nature of the bidding process.

Three recent cases where the FCC has reviewed (and in two cases, reversed) USAC's determinations show that a provider that merely furnishes meals and pays travel expenses to facilitate a product demonstration does not, without more, compromise an otherwise competitive and open bidding process.

a. *Kings Canyon*

In *Kings Canyon*,[7] USAC had found that the Commission's previous competitive bidding rules had been violated where the service provider had provided meals and covered expenses of school district personnel who visited a customer site to learn about the provider's services. *Kings Canyon*, at 4084. USAC then sought to recover program funds from the school district and service provider.

The Bureau reversed USAC's decision. The Bureau first concluded that the competitive bidding process was fair and open under the Commission's rules, based on the facts that the service provider selected was the lowest bidder, and had offered a proposal tailored to the district's unique needs. The Bureau then went on to conclude that there had been no violation of the then-current rules, and no evidence of waste, fraud, or abuse, and opined that the district's receipt of gifts from the provider had not "impede[d]" the competitive process. *Id*. at 4084-85. That is, not only was the process competitive on the whole, but the service provider's conduct did not even reduce the competitiveness of the process. *See id*. At minimum, then, *King's Canyon*

[7] *In Re Requests for Review of Decisions of the Universal Serv. Adm'r by Kings Canyon Unified Sch. Dist. Reedley, CA*, et al., 27 FCC Rcd 4084, 4085 (WCB 2012).

shows that a service provider could provide meals and cover the expense of a site visit by a school or library representative without diminishing the competitiveness of the process.

Although the Bureau cautioned that the conclusion *could* be different under the current rules, *id*. at 4085, it left that question open, and did not provide notice as to how the result might have differed. In particular, *Kings Canyon* gives no indication that the overall conclusion that the process had been competitive, fair, and open would have necessarily been different had the newer rules been applied to the facts there. Indeed, it could not. The actual conduct would be exactly the same under either set of rules, and the Bureau found that that particular conduct did not make the process less competitive.

The primary difference between this case and *Kings Canyon* is that UDT's conduct occurred just after the new gift rules went into effect. As in *Kings Canyon*, the service provider – here UDT – provided meals, and covered the expense of a one-night hotel stay for a District employee's site visit for purposes of learning more about the equipment it was considering purchasing. Although here, the visit was to a Cisco demonstration site, rather than a customer site, the basic purpose was the same – facilitating a demonstration of the technology solutions, so that the school could determine whether the equipment would meet its needs.

As in *Kings Canyon*, UDT submitted the winning bid; its bid scored highest among the four received based on four weighted factors: (1) price, (30%); (2) previous experience (25%); (3) quality of solution (25%); and (4) compatibility with the District's network (20%). Also as in *Kings Canyon*, UDT had tailored its services to the District's needs – including the District's past deployment of Cisco equipment and the particular needs of a small rural school district.

b. *Dimmitt*

In *Dimmitt*,[8] the Bureau made it clear that conference travel expenses and modestly-priced meals do not compromise the competitive bidding process. There, the service provider had provided $450 in conference travel expenses, a few meals that cost under $35 per person, plus a number of gift cards and other gifts ranging in value from $35 to approximately $50. The Bureau characterized these amounts as "minimal" and "small," ruling that "the gifts at issue here did not, by themselves, compromise the bidding process." *Dimmitt*, like *Kings Canyon*, applied the Commissions' previous rules and indicates that the some of the conduct there would have violated the new rules. But *Dimmitt* does not indicate that any of the conduct would have changed its conclusion that the competitiveness of the bidding process as not compromised by the conduct. It simply leaves the Commission open to enforce the rules through appropriate sanctions.

c. *Lakehills Consulting*

In *Lakehills Consulting*, the Commission found that the bidding process was not fair and open. In that case, the Commission observed that (1) the winning bidder was selected just 4 days into the 28-day bidding process, (2) the winning bidder had provided $60,000 in loans to the school district, and (3) the winning bidder has provided "extensive gifts" including Super Bowl tickets, and trips to Las Vegas, in addition to meals and tickets to other sporting events. On that record, the Commission concluded that the "competitive bidding process was not fair and open,"

---

[8] *In Re Requests for Review of Decisions of the Universal Serv. Adm'r by Dimmitt Indep. Sch. Dist. Dimmitt, Texas E. Cent. Bd. of Coop. Educ. Servs. Limon, Colorado Houston Cty. Sch. Dothan, Alabama Trillion Partners, Inc. Austin, Texas Sch. & Libraries Universal Serv. Support Mechanism*, 26 FCC Rcd 15581, 15588–89 (WCB 2011).

and remarked that "Service provider actions of the type addressed here suppress fair and open competitive bidding and ultimately damage the integrity of the E-rate program."[9]

2. Commission precedent mandates a finding that UDT's conduct here did not compromise the competitive and open bidding process here.

The Commission's precedent in *Kings Canyon* and *Dimmitt* establishes that the integrity of the bidding process is not impaired by paying small expenses of the types at issue here. *Lakehills Consulting*, in contrast, illustrates the type of egregious conduct that does threaten the integrity of the process, such as expensive gifts that could be resold combined with factors such as awarding the contract within the 28-day window. The new bright-line gift limits do not change the principle of law governing the proper remedy articulated in these prior cases where a violation of the gift rules is found. Rather than applying that standard, USAC wrongly assumed that even a technical violation of the Commission's gift rules, ipso facto, threatens the bidding process and therefore warrants an automatic claw-back of 100% of the funding– no matter how trivial or minor the violation was.

The service provider in *Kings Canyon* engaged in essentially the same conduct that UDT did here (providing meals, covering travel costs for a visit to demonstrate technology). The context was also similar; here UDT was the highest scoring bidder, and there is no indication of waste, fraud, or abuse. In light of *Kings Canyon*, USAC should have determined that the conduct here did not change the competitive nature of the process. *Dimmitt*, where travel expenses of $450 (compared to the $106.12 hotel bill here) were deemed "minimal" and held not to compromise the bid process, buttresses that conclusion.

---

[9] *In Re Request for Review of Decisions of the Universal Serv. Adm'r by Joseph M. Hill Tr. in Bankr. for Lakehills Consulting, Lp. Sch. & Libraries Universal Serv. Support Mechanism*, 26 FCC Rcd 16586, 16596–97 (FCC 2011).

But instead, the COMAD reached the opposite conclusion, referring to "a competitive bidding process that was not fair and open." In denying UDT's appeal, USAC did not explain the basis for that conclusion. In essence, USAC reached the conclusion that the Commission reached in *Lakehills Consulting*, despite the fact that the severity of the conduct there (*e.g.*, premature selection, Super Bowl tickets, and $60,000 in loans) was many orders of magnitude more serious than anything that occurred here. USAC's denial does not dispute that the FCC previously found that a competitive bidding process was fair and open despite the existence of gifts of larger value than the ones at issue."[10] Nor does it expressly disagree with UDT's assertions that the Commission "considers the overall context of the competitive bidding process when applying the FCC's gift rule."[11] But USAC's denial does not even evaluate the threshold question of whether the overall process was competitive. Instead, it simply reiterates that the gift rules were violated, neglecting to explain whether those alleged violations altered the competitiveness of the overall process, or how they could have.

Rather than applying the standards established by *Kings Canyon*, *Lakehills Consulting*, and *Dimmitt*, USAC wrongly assumed that even a technical violation of the Commission's gift rules, *ipso facto*, renders the bidding process non-competitive, and therefore warrants an automatic claw-back of 100% of the funding – with no assessment of how trivial or minor the violation was in the overall context of the bid process. That assumption is contrary to precedent.

---

[10] *Appeal by United Data Technologies, Inc. of USAC Commitment Adjustment Decision Dated June, 23, 2015 Regarding FRN 813142* ("UDT's USAC Appeal"), at 4; USAC Decision, at 3.
[11] UDT's USAC Appeal, at 5; USAC's Decision, at 3.

3. Logic and common sense confirm that UDT's conduct did not threaten the integrity of the bidding process here.

USAC's assumption that any "gift" violation causes the bid process to cease being fair and open not only defies Commission precedent, but defies logic and common sense when applied to the facts here. Mr. Hatcher received no personal benefit from Mr. Merchant's decision to pick up the costs of the hotel and meals; because Mr. Hatcher was travelling on business, the District would have covered those expenses in any case. Even if Mr. Merchant's courtesies made reimbursement unnecessary, there is no plausible scenario here in which the prospect of avoiding $157 would have caused the District to select UDT over a higher-scoring, more qualified provider. The District's choice reflected weighted four criteria: (1) price, (30%); (2) previous experience (25%); (3) quality of solution (25%); and (4) compatibility with the District's network (20%). The fact that UDT outscored its competitors reflected all of these factors, and particularly UDT's status as a Cisco Gold Certified Partner that could – and did – complete its internal connection project with E-rate support. That choice was open and fair, and UDT scored highest not only on the weighted average but on the raw score. Those scores, not any untoward action by UDT, drove the District's selection of UDT. Very simply, UDT was selected because it submitted the best bid, which drew on its experience, its expertise with Cisco equipment, and the good fit between its technology offerings and the District's existing infrastructure. Nothing about the process was unfair or anti-competitive. Under these circumstances, Mr. Merchant's payment of Mr. Hatcher's minor business expenses cannot reasonably be deemed to have created an "unfair" competitive bidding process.

C. Clawing back the entire E-rate funding award based on USAC's departure from Commission precedent would be arbitrary and capricious and would violate Due Process

As explained above, in reviewing USAC's decision here, the Bureau should continue to adhere to the Commission's longstanding precedent, under which furnishing modest meals, minor travel expenses, or low-value gifts, does not compromise the bidding process. It should heed the Commission's warning that seeking full reimbursement of previously disbursed funds for rule or program violations is not always appropriate.

As explained above in section VI(A), Due Process and the APA requirement of fair notice prohibit the Commission from penalizing entities for failing to predict that the Commission would depart from past precedent. *See Fox Television Stations, Inc.*, 132 S. Ct. at 2317; *Satellite Broadcasting*, 824 F.2d at 3-4. *See also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding.").

Therefore, any departure from the principles of *Kings Canyon* and *Dimmitt* cannot be applied retroactively to penalize, or claw back funding from, a party whose violation took place while the earlier precedent was still good law.[12] Although the Commission could adopt a new standard *going forward* under which (1) minor gift violations render the entire process other than competitive and open, and (2) such gift violations justify the clawing back of an entire award, it could not apply such a standard retroactively to violations that occurred before the standard was

[12] As noted in section VI(A), USAC's action here is plainly punitive in nature, whether or not it is expressly described as a "penalty," and in any case the fair notice requirements extend beyond "penalties."

articulated in a manner that provided regulated entities with fair notice. *See Satellite Broadcasting*, 824 F.2d 1, 3-4 (D.C. Cir. 1987).

Here, it was reasonable to expect that the new gift rules would be interpreted consistent with Commission precedent on the question of what types of expenditures did, and did not, compromise a fair and open bidding process, and therefore, cannot justify the type of massive forfeiture proposed by USAC here. The Commission cannot retroactively enforce a departure from that precedent against UDT.

D. While the Commission could abandon its precedent prospectively, doing so would have far-reaching, adverse policy implications

Even if it is within the power of the Commission to prospectively disavow the precedent established in *Kings Canyon* and *Dimmitt* concerning the integrity of the bidding process, there is no sound policy reason for doing so here. Indeed, adopting the standard that USAC has applied here, in which (1) minor gift violations always and necessarily render the entire process non-competitive, and (2) such gift violations mandate clawing back the entire funding award would have far-reaching, adverse policy implications that would be disastrous for the E-rate program.

Moreover, the Commission does not face an all-or-nothing approach in which it must either punish all gift violations with full (and disproportionate) claw backs or else allow all minor gift violations to go unpunished. There is a reasonable middle ground that is sensible, equitable, and constitutional. Finally, although the Commission could overrule its prior precedent on what compromises the bidding process going forward, Due Process demands that UDT be given the benefit of the existing precedent.

1. USAC's approach would undermine the goals of e-rate and discourage transparency

Upholding USAC's view that even technical gift violations require massive forfeitures would erase important distinctions between different types of rule and statutory violations, and would unduly tie the Commission's hands, hampering its ability to take corrective action that is both congruent with the conduct in a particular case and serves as a useful deterrent against misconduct. Under the approach USAC has taken here, any technical violation of the gift rules would have the draconian consequence of unwinding a E-rate support – even where the support is of very significant proportions (*e.g.*, hundreds of thousands of dollars, as here, or even millions or tens of millions) and even where the violation is, by comparison, *de minimis* (*e.g.*, 10 dollars or even one dollar over the limit).

The risk of this draconian consequence contrary to public policy is heightened because under USAC's reading of the rule, there is no scienter requirement – no guilty state of mind – needed to establish a violation of the gift rules. In other words, a violation could occur entirely innocently – and without any intent to try to influence a school district's judgment, much less actually influencing the District. In USAC's view, it matters not one whit whether an employee provides a prohibited gift out of generosity or courtesy, rather than with a corrupt or devious motive. But of course, in reality it should matter. Violations that are, at most, inadvertent even if problematic, are much less likely to threaten the integrity of the bidding process than intentional violations done with an eye towards improperly influencing the process. USAC's approach, however, inexplicably places all these violations on par with each other, as if Commission precedent includes no room to make sensible distinctions between these different types of conduct.

Such a rule would undermine the benefits of the E-rate program. For example, it would deprive schools and students of much-needed equipment and services, even in instances where a single employee of a service provider unintentionally or inadvertently commits a technical violation of the gift rules. The risk of such an inadvertent violation is actually quite high when one considers that both school districts and service providers may have a large number of employees, and sometimes use agents or consultants to navigate the E-rate funding process. Under USAC's logic, then, any inadvertent failure to strictly adhere to the new gift rules would have the draconian consequence of unwinding an entire year's worth of funding.

Moreover, forcing UDT to repay the entire award, which is grossly disproportionate to the minor violations alleged here, would discourage service providers from reporting potential violations they discover to USAC. Disproportionate penalties like that here would particularly discourage E-rate providers from serving small rural areas like Miller County, because the risks that a minor violation would result in a draconian penalty would outweigh the modest profits available from engaging small rural school districts such as Miller County.

2. Reversing USAC would not mean that there will be no consequences for violations of the gift rules; the Commission has discretion to impose consequences for failure to abide by its rules.

USAC's decision appears to implicitly assume that, faced with conduct like that at issue here, the Commission must either (1) find that there was no violation, however minimal, or (2) find that there was a violation and claw back the entire award as a result. But that is not so. There is a middle ground that avoids USAC's all-or-nothing approach.

The Commission precedent analyzed above does not preclude enforcement of the E-rate gift rules, or punishment of minor violations of those rules through reasonable sanctions that are proportional to the violations and consistent with Due Process. A proportional amount could be

determined, for instance, by applying a single-digit multiplier to the amount by the gift limits in section 54.503 were exceeded. Such a sanction would be suitable to discourage repeat violations but also consistent with constitutional limits, equitable principles, and norms of proportionality. *Cf. State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) (finding that imposing punitive damages above a "single-digit multiplier" violated the Substantive Due Process Clause of the Fourteenth Amendment); *United States v. Bajakajian*, 524 U.S. 321, 321, 118 S. Ct. 2028, 2029–30, 141 L. Ed. 2d 314 (1998) (holding that the Eight Amendment's Excessive Fines Clause prohibited the government from confiscating $357,144 for failure to report transporting money).

Here, if the Bureau determines that there was a minor violation and it declines to grant UDT's request for waiver articulated in Section VI(E) below, it can and should impose only a minor penalty, based on a single-digit multiplier. UDT and/or the District could be required, for example, to pay an amount based on the amount by which section 54.503 was violated. Here, at worst, UDT exceeded that gift limit by $107.11. Multiplying that amount by nine (the largest single-digit multiplier) would result in payment of no more than $963.99. Certainly, that amount would be more in line with principles of equity and Due Process than the huge amount that USAC claims.

E. Waiver is justified here to avoid disproportionate fines.

To the extent that the Commission's rules and precedent mandate an $872,586.54 claw back as the consequence for providing, at most, $107.11 more in "gifts" than the law allows, the Commission should waive the application of section 54.503 here in the interests of encouraging participation in the E-rate program. The Commission may waive any of its rules for good cause. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the

particular facts make strict compliance inconsistent with the public interest, taking into account hardship, equity, or more effective implementation of overall policy on an individual basis. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)). Waiver of the Commission's rules is appropriate when (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

To the extent that the Commission determines that strict application of section 54.503 would require rescinding all funding, rather than a proportional sanction, then the Commission should waive the rule (and perhaps, also impose a modest sanction that is commensurate with the violations here). Waiver would avoid the adverse policy implications of imposing the same harsh penalties for *de minimis* technical violations, like in this case, as would be imposed for serious violations that would actually threaten the competitive and open nature of the process (such as a service provider using large gifts of cash or valuables to influence a district to select its bid over that of a superior competitor). Revoking the whole award in both circumstances sends the message that the second conduct is not worse than the first. Judicious use of waiver would avoid sending that destructive message.

[[ ]]

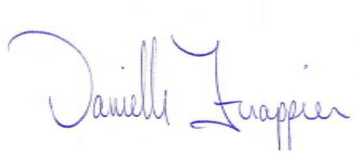
F. The District, not UDT, should pay the bulk of any amount owed as a result of violations here.

The fundamental purpose of the E-rate program is to provide schools and libraries with discounted communications equipment and services. UDT should not be required to unilaterally bear the cost of providing deeply discounted equipment to the District at its own expense. The E-rate funding here was earmarked for obtaining equipment for the District at discounted rates, and that purpose was fully achieved. Forcing UDT, the service provider, rather than the District, to repay funds that have already been spent on equipment for the District's benefit leaves the District with all the benefits and the service provider to shoulder the whole burden. Indeed, if USAC is permitted to claw back the funds entirely from UDT, then the E-rate fund will remain unused; UDT, rather than the fund, will have been forced to privately subsidize the District's equipment.

VII. CONCLUSION

For all the foregoing reasons, appellant United Data Technologies, Inc. respectfully urges the Bureau to reverse USAC's determination that there was a violation of section 54.503 here. If the Bureau determines that a violation occurred, UDT asks that it nonetheless reverse USAC's determination that the entire $872,586.54 E-rate award for funding year 2011 must be rescinded, and instead impose a sanction that reflects the *de minimis* nature of any violations of the rule. In the event that the Bureau determines that section 54.503 would require it to rescind the entire award for a violation found here, UDT urges the Bureau to waive application of the rule for good cause demonstrated above. Finally, if the Bureau does rescind all or a significant amount of funding here, UDT requests that it seek repayment from the District rather than UDT.

Respectfully submitted,



Danielle Frappier
Peter Karanjia
Alan Galloway
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006-3401
Attorneys for United Data Technologies, Inc.

Public Version

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of Request for Review by United Data Technologies, Inc. of Decision of Universal Service Administrator	WC Docket No. 02-6 Funding Request Number 2209152 Form 471 Application Number: 813142

DECLARATION OF ENRIQUE A. FLECHES IN SUPPORT OF REQUEST FOR REVIEW BYUNITED DATA TECHNOLOGIES, INC. OF USAC DENIAL OF APPEAL

I, Enrique A. Fleches, under penalty of perjury, declare:

1. I am over the age of 18 years.

2. I am the Chief Executive Officer of United Data Technologies, Inc. ("UDT").

3. UDT has its principal place of business in Doral, Florida, with additional offices in Florida, Texas, Oklahoma and Tennessee.

4. UDT is a technology enabler that assists schools and libraries with E-rate projects.

5. UDT has assisted schools and libraries with E-rate since 2000.

6. UDT employs approximately [[ ]] persons.

7. Since June 2010, UDT has been a Cisco Gold Certified Partner.

8. The Cisco Gold Certified Partner designation comes from Cisco Systems and must be periodically renewed. The designation requires UDT to meet Cisco standards, and requires UDT engineers to undergo a rigorous training program with respect to Cisco products.

9. As a Cisco Gold Certified Partner, UDT and its employees are trained and certified to provide a much higher quality level of service, significantly greater technical

expertise, and therefore a higher rate of overall success and customer satisfaction compared to other vendors of Cisco products with lower certification status and fewer or lesser trained and certified engineers.

10. UDT received $872,586.54 in E-rate funding in connection with an internal connections project for the Miller County School District in funding year 2011. The majority of this funding was used to procure Cisco equipment that was installed at Miller County School District locations.

11. [redacted]

12. [redacted]

13. [redacted]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on this 29 day of June, 2017 at Orlando, Florida.

By _____

Enrique A. Fleches, CEO
United Data Technologies, Inc.